Supreme Court of the United States

OCTOBER TERM, 1926

NO. 360.

IVY L. LEONARD AND THOMAS B. LEONARD,
Co-Partners, Trading as I. L. Leonard & Company,
Appellants,

vs.

SWEPSON EARLE, Conservation Commissioner of Maryland, and Head of the Conservation Department of the State of Maryland,
Appellee.

Appeal from the Court of Appeals of Maryland.

BRIEF ON BEHALF OF APPELLANTS.

WILLIAM L. RAWLS,
Counsel for Appellants.

Byron Press, Inc., Printers, 420 E. Lombard St., Baltimore, Md.

INDEX.

PAGE

The Question Raised by the Appeal..... 1

The Act of Assembly Involved..... 3

Statement of the Case..... 4

The Case is not Moot..... 7

Specification of Error..... 8

Propositions..... 9

1. That the requirement of Chapter 119 of the Acts of the General Assembly of Maryland of 1927 that oyster packers shall agree to deliver to the Conservation Department of Maryland ten per cent. (10%) of the shells from all oysters packed in their establishment as a condition precedent to obtaining a license to engage in business constitutes a taking of private property for public use without compensation in violation of the Fourteenth Amendment to the Constitution of the United States..... 10

2. The act is in violation of the commerce clause of the Constitution of the United States in that it requires appellants to deliver to the Conservation Department of Maryland ten per cent. (10%) of shells taken from oysters packed by them in Maryland, thus removing that amount of shells from interstate commerce..... 24

3. The act denies to appellants the equal protection of the laws of the State in violation of the Fourteenth Amendment in that it imposes upon them as packers of oysters a form of exaction not imposed upon any other business or occupation..... 25

PAGE

4. The act compels the packers to keep and store upon his premises ten per cent. (10%) of the shells referred to in the act until they are removed by the Conservation Department without any compensation for the use and occupation of the packers' property and constitutes, therefore, a taking of his property without due process of law. 25

Conclusion. 27

TABLE OF CASES.

PAGE

Applegarth v. State, 89 Md. 140. 18
Butler v. Perry, 240 U. S. 328. 22
Cooley On Taxation, Secs. 23, 24. . . . . 21, 23
D., L. & W. R. R. Co. v. Morristown, 276 U. S. 182. . 16, 26
Foster Fountain Packing Co. v. Haydel, decided October 15, 1928. Not yet reported. 24
Frost Trucking Co. v. R. R. Commission, 271 U. S. 583. 19
Gray On Limitations Of Taxing Power, page 130. 16
Housk v. Little River District, 239 U. S. 254. 15
Lane v. Oregon, 7 Wall. 71. 24
Lewis On Eminent Domain, Sec. 4. 17
New Jersey v. Anderson, 208 U. S. 483. 15
Pumpelly v. Green Bay Co., 13 Wall. 166. 13
Security Mutual Life Ins. Co. v. Prewitt, 20 U. S. 446. . 8
Short v. State, 80 Md. 392. 22
State v. Applegarth, 81 Md. 293. 18
Williams' Case, 3 Bland (Maryland), 186. 23

STATUTES.

Annotated Code of Maryland (Bagby), Art. 72, Sec. 98, *et seq*. 14
Acts of the General Assembly of Maryland of 1927, Chapter 119. 3

IN THE

Supreme Court of the United States

IVY L. LEONARD AND THOMAS B. LEONARD,
CO-PARTNERS, TRADING AS I. L. LEONARD & COMPANY,
Appellants,

vs.

SWEPSON EARLE, CONSERVATION COMMISSIONER OF MARYLAND, AND HEAD OF THE CONSERVATION DEPARTMENT OF THE STATE OF MARYLAND,
Appellee.

Appeal from the Court of Appeals of Maryland.

BRIEF ON BEHALF OF APPELLANTS.

The Question Involved in the Appeal.

This is an appeal from a judgment of the Court of Appeals of Maryland upholding the constitutional validity of Chapter 119 of the Acts of the General Assembly of Maryland of 1927, requiring every person or corporation engaged in the packing of oysters to procure a license from the Conservation Department of the State, which shall be in the nature of a contract between the State and the packer and which shall provide that the licensee shall turn over to the State at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, or, at the option of the Conservation Department of the State shall pay the equivalent of this ten per cent. of the shells in money.

Appellants main contention is, that this act constitutes a taking of private property for public use without just compensation and therefore amounts to a taking of property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

The act does not limit the shells required to be delivered to those taken from the waters of the State, but operates indiscriminately upon all shells regardless of whether they come from within or without the State. It operates also upon shells coming from bottoms theretofore leased by the State to individuals as well as from bottoms owned by the State. Furthermore, nowhere in the act is there any attempt to reserve title in the State to shells coming from bottoms under the control of the State. When the oysters are taken from the waters of the State the taker is free to ship them beyond the State without any obligation to deliver any portion of the shells to the Conservation Department; for the requirement of the delivery of shells is imposed only upon "any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market," that is to say, a packer of oysters. Until the shells reach the packer, there is no attempt to impose any obligation upon the owner to deliver any part of them and he may dispose of them wherever and to whomsoever he pleases. The act can not be justified upon the ground that the State is retaking or recapturing property which it owned and has parted with upon the specific condition that a certain part of it must be returned because (1) it has made no reservation of title, and (2) the act is made to apply to property which the State never owned, that is to say, to shells taken from oysters coming from other States and to those coming from leased or private bottoms within the State.

What the act does, therefore, is this—it requires an oyster packer as a condition precedent to his right to engage in or to continue the business of oyster packing to agree that he will deliver to the state a portion of his private property to

be used for a public purpose without any compensation. This it is submitted is a taking of property without due process of law.

The Act of Assembly Involved.

The preamble and pertinent provisions of Chapter 119 of the Acts of 1927 are as follows:

"Whereas, the demand for oysters is constantly increasing and the oyster bars and rocks of Chesapeake Bay and its tributaries are showing such great depletion that constructive legislation is necessary to preserve and rehabilitate such depleted areas, and

"Whereas, a Seafood Committee, consisting of representatives from each tidewater county, was appointed by Governor Albert C. Ritchie, to investigate and recommend remedial legislation to increase the oyster supply of Maryland, among which was the recommendation that the State should reserve ten per cent. of all shells made by the oyster packing houses to be planted upon reserved and seed areas; therefore:

"Section 1. Be it enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of Public General Laws of Maryland, title 'Oysters,' sub-title 'Packing Oysters,' providing for licensing of oyster packers be and is hereby repealed and reenacted, with amendments, to read as follows:

"91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the

State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

* * * * * * * * * *

"91A. All moneys derived from said license fee of twenty-five dollars shall be paid over to the Comptroller to be credited to the Conservation Fund, and one-half of the shells received by the Conservation Department shall be transplanted upon such natural beds or bars as may be reserved by the Conservation Commissioner as provided for elsewhere in this Article, and the other one-half of said shells shall be planted on such seed areas as may be set aside by the Conservation Commissioner for seed oysters. In case money is paid in lieu of the ten per cent. of shells, the Conservation Commissioner shall convert same into shells or seed oysters to be transplanted in like manner.

Statement of the Case.

Appellants are engaged in the packing of oysters and for several years before the act of 1927 had owned and

maintained a plant for that purpose at Cambridge, Md. Appellants applied on August 30, 1927, to the Conservation Department for a license to pack oysters for the season 1927-1928, accompanying said application by a check of twenty-five dollars. In their application they expressly denied that the license would be a contract between the State of Maryland and themselves, requiring them to deliver to the former shells or money in lieu of shells, and refusing to enter into any such contract upon the ground that the provisions of Chapter 119 of the Acts of 1927 so requiring were unconstitutional and void. Upon the refusal of the Conservation Department to issue a license upon this application, appellants filed their petition for a mandamus in the Baltimore City Court praying that the Department should be required to issue a license to appellants without the requirement prescribed by the challenged provisions of the act of 1927 (Rec. 2-3). The theory of the petition was that in so far ast the act of 1927 required the payment of the license fee of $25 it was valid, and that this requirement was separable from the invalid provisions with reference to the contract for the delivery of shells.

The petition alleges that during the packing season of 1926-1927 (this season extending from September 1 to April 25) they packed at their place of business 50,800 bushels of oysters, and in the season of 1925-1926, 52,714 bushels of oysters, that in each of these seasons about ten per cent. (10%) of the oysters packed by them were bought outside the State of Maryland (Rec. 2, 7). It alleges also that in addition to these oysters from other states than Maryland, appellants, during the packing season of 1927-1928 (the season for which the license was asked) would use oysters from rented or leased bottoms in the State of Maryland, and that these, together with those coming from states other than Maryland, would constitute about ten per cent. (10%) of the oysters used by them during that season (Rec. 2).

The petition further alleges, upon information that during each year there are shucked and packed in the State of Maryland by various persons, firms and corporations en-

gaged in the packing of oysters, large quantities of oysters from other states, particularly from the States of Virginia and New Jersey, and that in certain sections of the State of Maryland, particularly in Somerset County, Maryland, the quantity of oysters from the State of Virginia shucked and packed by packers and canners in that section and county approximates fifty per cent. (50%) of all oysters shucked and packed therein (Rec. 2).

The appellee filed a combined demurrer and answer to this petition, which, apart from denying the conclusions of law set forth in the petition, challenged certain estimates of appellants as to the proportion of oysters from other states packed by them and others in the same business in Maryland. The answer alleged that, according to reports submitted by appellants to the Conservation Department as required by law for the oyster-packing season of 1926-1927, only two per cent. (2%) of the oysters shucked in the establishment of petitioners during said season did not come from the waters of the State of Maryland, and that during the oyster-packing season of 1925-1926 only one-third of one per cent. (1%) were oysters from states other than the State of Maryland. It further alleged that in Somerset County the quantity of oysters from the State of Virginia shucked and packed by packers and canners in that county was approximately sixteen per cent. (16%) of all the oysters shucked and packed therein, and not fifty per cent. (50%) as alleged in the petition (Rec. 23).

Appellants demurred to the answer of the appellee because, while the figures as to the quantity of oysters packed by appellants and others, originating in other states differed, still the following facts which present the basis of appellants' contention were admitted:

(a) That appellants would, in the natural course of business during 1927-1928, pack oysters not originating in the State of Maryland, but coming from other States, principally New Jersey and Virginia;

(b) That the Act in its operation would result in requiring the packers in Somerset County, State of Maryland, to deliver shells to the Conservation Department which were from oysters imported from other states, to the extent of approximately sixteen per cent. (16%) of all those shucked and packed in that county.

(c) It was also admitted, because not denied, that large quantities of oysters from other states, particularly from the States of Virginia and New Jersey, are shucked and packed by packers in Maryland during each year;

(d) That appellants would pack in the natural course of their business during the season of 1927-1928, oysters which would come from rented or leased bottoms in the State of Maryland, and would not come from the natural oyster rocks of the State.

Upon these facts the case was argued and decided in the Baltimore City Court and in the Court of Appeals of Maryland. From the final judgment of the Baltimore City Court overruling appellants' demurrer to the answer of appellee and dismissing the petition, appellants appealed to the Court of Appeals, where this judgment was affirmed. The question of the validity of the provisions of Chapter 119 of the Acts of 1927 of the General Assembly of Maryland under the Fourteenth Amendment and other provisions of the Constitution of the United States, was expressly raised in the petition, and was decided by the Court of Appeals of Maryland, that court holding the provisions of the said act to be valid.

The Case Is Not Moot.

Appellants filed their petition to obtain the writ of mandamus to compel the issuance of a license for the year 1927-1928. That year has expired, but under the decisions of the Court of Appeals of Maryland where a law requires the renewal of a license from year to year in order to enjoy any privilege, the mere lapse of a particular year does not render judicial proceedings concerning it, moot, because,

as the court holds the rights of the party asking for the license are still involved as to subsequent years.

In view, however, of the decision of this court in *Security Mutual Life Insurance Company v. Prewitt*, 200 U. S. 446, and of the practice approved in the later case between the same parties in 202 U. S. 246, 248, the appellants and appellee have entered into a stipulation which at the argument leave of court will be asked to file, reciting two facts: (1) That appellants renewed their application for a license for the year 1928-1929 in the same form and manner as that in which application was made for the year 1927-1928, and it was refused upon the same grounds by the Conservation Commissioner as those upon which he refused the application for the preceding year. (2) That no shells have been taken from appellants by appellee for the season 1927-1928 in pursuance of the provisions of Chapter 119 of the Acts of 1927, nor has the equivalent in money of said shells been collected by appellee, it being his purpose to withhold any such action until the decision of this case by this court. This proposed stipulation is printed as an appendix to this brief. Accordingly, it appears that the questions involved in the appeal have not become moot by the efflux of time.

Specification of Error.

The appellants have assigned eleven grounds upon which they contend that the judgment of the Court of Appeals of Maryland was erroneous (Rec. 52, 54), all of which grounds are relied on in this court. In substance these assignments of error are:

1. That the exaction of Chapter 119 of the Act of 1927 amounts to a taking of property without due process of law (Assignments 1, 2, 3, 4, 6, 9, 11).

2. That the act imposes an unconstitutional burden upon interstate commerce (Assignment 5).

3. That it denies to the appellants the equal protection of the laws (Assignments 7, 8, 10).

Upon the foregoing statement of facts the appellants submit the following

PROPOSITIONS.

1. That the requirement of Chapter 119 of the Acts of the General Assembly of Maryland of 1927 that oyster packers shall agree to deliver to the Conservation Department of Maryland ten per cent. (10%) of the shells from all oysters packed in their establishment as a condition precedent to obtaining a license to engage in business constitutes a taking of private property for public use without compensation in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The act is in violation of the commerce clause of the Constitution of the United States in that it requires appellants to deliver to the Conservation Department of Maryland ten per cent. (10%) of shells taken from oysters packed by them in Maryland, thus removing that amount of shells from interstate commerce.

3. The act denies to appellants the equal protection of the laws of the State in violation of the Fourteenth Amendment in that it imposes upon them as packers of oysters a form of exaction not imposed upon any other business or occupation.

4. The act compels the packer to keep and store upon his premises ten per cent. (10%) of the shells referred to in the act until they are removed by the Conservation Department without any compensation for the use and occupation of the packers' property and constitutes, therefore, a taking of his property without due process of law.

I.

The intent of the act is clear and if valid would vest in the Conservation Commissioner the power to go upon the premises of appellants, take ten per cent. (10%) of the shells resulting from a season's pack, transport them to some place in Chesapeake Bay to be determined by the Commissioner and there plant them "upon reserve and seed areas." It is a case where the state needing particular property for a specific public use appropriates such property without making any compensation to the owner therefor. This is the inevitable effect of the act unless it can be shown that the property appropriated is not the property of the person from whom it is taken, but of the state itself, or that it is property which, although found in the possession of an individual, such possession is accompanied by some reservation or right in the state which authorizes the state to appropriate it. The question of whether or not the property is the absolute property of the individual from whom it is taken, or whether there exists any right upon the part of the state to take it by reason of any title which it may have, should first be disposed of.

(a) In the first place, with regard to the oysters taken from the beds owned by the state, it will be seen that the act does not purport to make any reservation of title whatsoever to the oysters or to the shells. The state parts absolutely and irrevocably with the oysters, including the shells when it permits them to be taken by the tonger or dredger. *Not a word is said in the act about the retention of any right or title in the state with regard to such oysters.* Unless they reach a canner or packer within the State of Maryland the act does not apply at all. If the person who takes the oysters ships them to another state they are free entirely from the operation of the act. The contention is, therefore, not open to the appellee in this case that the act is dealing with property which belonged to the state and which as the proprietor thereof it had the right to attach

such conditions or reservations to its disposition as it saw fit. No reservations or conditions are attached, the act does not operate until long after the state has unqualifiedly and unreservedly parted with possession of and title to the oysters.

The only words in the act upon which by any possibility it could be contended that an intention is indicated to make any reservation whatsoever are found not in its operative sections but in the preamble, where, referring to the recommendations of a certain seafood committee appointed by the Governor of Maryland, it is said, "among which was the recommendation that the State should reserve ten per cent. (10%) of all shells *made by the oyster-packing houses* to be planted upon reserve and seed areas," etc.

When the oysters are taken from the waters of the State they may be shipped into other States or disposed of in the State of Maryland with perfect freedom and no requirement is made that any part of the shells shall be redelivered to the State unless the oysters reach a packer within the State. The case in this respect is similar to that of *Foster-Fountain Packing Co. v. Haydel*, decided by this Court on October 15, 1928. In that case a statute of Louisiana did attempt by its language to make reservation of title to certain parts of shrimp caught in the State, but permitted the other parts to be freely shipped out of the State and permitted them to be dealt in without any qualification within the State. This Court in holding that the attempt to compel the retention of certain parts of the shrimp within the State was abortive, used this language which is applicable here:

> "It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. The State does not require any part of the shrimp to be retained for consumption or use therein. Indeed only a small part is consumed or needed within the State. Consistently with the act all may be, and in fact nearly all is, caught for transportation and sale in inter-

state commerce. As to such shrimp the protection of the commerce clause attaches at the time of the taking. *Dahnke-Walker Co. vs. Bondurant, supra; Penna. vs. West Virginia, supra,* 221 U. S. 596. As the representative of its people, the State might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the State is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause. They are not bound to comply with, or estopped from objecting to, the enforcement of conditions that conflict with the Constitution of the United States."

It is manifest from the language of the Act of 1927 that it was never intended to make any reservation of title in oysters taken from the beds over which the State had control, because it makes no reference whatever to any such oysters but indiscriminately reserves ten per cent. (10%) of all shells made by the oyster-packing houses, regardless of where the oysters come from, whether from within or without the State, or from leased bottoms. Even if it be conceded as to those oyster beds under the control of the State it could attach a condition to the privilege of taking them which would bind all persons in the State

who subsequently come in possession of such oysters to return such percentage of the shells as the State might prescribe, still language adequate to express such a reservation must be employed and the provisions of such a law must be consistent with that intent. No such language is found in the act in question.

As was said by this Court in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 182, where title to land had been obtained by patent from the United States without reservation, and it was contended that the owner for this reason could make no claim against the Government for its inundation:

> "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise and parts with the fee by patent without reservation, it retains no right to take that land for public use without just compensation; nor does it confer such a right on the State within which it lies, and that the absolute ownership and right of private property is not varied by the fact that it borders on a navigable stream."

(b) What has been said as to the lack of any intention to reserve any title to the oysters which would permit the retaking of their shells after removal from the waters of the State is more clearly shown by the fact that the shells dealt with are shells found in the oyster-packing houses regardless of the origin of the oysters from which they come. The pleadings in this case show that substantial quantities of oysters come from other states and are packed by appellants. Likewise they show that in one of the counties of the State sixteen and one-half per cent. (16½%) of all the oysters packed therein come from other states. The State of Maryland, of course, never had any title or right whatever to such oysters, yet the Act of 1927 plainly attempts to subject them to its operation and requires ten per cent. (10%) of the shells therefrom to be delivered to the Conservation Commission.

Under the law of Maryland certain barren bottoms may be leased to individuals for the planting of oysters. There is no provision in the planting law requiring any part of the shells coming from oysters grown upon these leased bottoms to be delivered to the State, and of course the General Assembly of Maryland cannot, after leases have been made to individuals, attach any such condition without impairing the obligation of its contract. The oysters therefore grown upon these leased bottoms are the private property of the individuals holding the leases, and the State can no more take the shells from such oysters than it can take any other private property without making compensation. Annotated Code of Maryland (Bagby), Article 72, Secs. 98, *et seq.*

The fact that the act by its terms thus operates indiscriminately upon shells taken from oysters coming from without the State and upon leased bottoms within the State, as well as from bottoms under control of the State is a demonstration that it can not be construed as containing a reservation of title to property which it at one time owned because as to a part of the property sought to be taken it has never owned it at all.

It will be noted that the Court of Appeals did not construe the act as applying only to oysters taken from public waters of the State, but held it to be applicable to all oysters packed in the State of Maryland. It upheld the act because it deemed the exaction of shells thereby imposed to be one which the State had a right to make upon oyster packers under its power to conserve and develop the State's natural resources.

But the State can not for such a purpose or for any other purpose take private property for public use without making just compensation therefor. It would be difficult to imagine a case where that fundamental guarantee of private property has been more clearly violated than by the exaction in question. Property which is indubitably that of individuals is appropriated, removed from their premises and devoted to a specified public purpose and no compensation is made therefor. Such a taking of private property,

under the guise of the exercise of the taxing power would, if upheld, make the constitutional guarantee against the taking of private property for public use without compensation meaningless for there must be a fundamental distinction between the power of taxation and the power of eminent domain.

In *New Jersey vs. Anderson*, 208 U. S. 483, 492, it is said:

> "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government."

And the same definition is found in *Housk vs. Little River District*, 239 U. S. 254-265.

The power of taxation has been also accurately defined by Judge Dillon in *Hanson vs. Vernon*, 27 Ia. 47:

> "What are taxes * * * I answer that by the concurrent opinion of lawyers, judges, lexicographers and political economists, as well as by the general and popular understanding, taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes, or to accomplish some governmental end."

The power of taxation enables the Government to provide itself with the revenue necessary for its operation. The power of eminent domain is that by which the Government takes particular property from the owner for a public use. To call the taking of specific property needed for a specific public use a legitimate exercise of the power of taxation would nullify the limitation upon the power of eminent domain that compensation shall always be made for the property taken under the exercise of that power. It would seem needless to elaborately discuss the distinction between these two great governmental powers or to enumerate those instances where under grave emergencies they may be found to approach each other in the ultimate results of their exercise.

It would not do to deny that where money under some extraordinary state of circumstances could not be readily obtained by taxpayers that they should be permitted to pay in kind. It is hardly imaginable, however, that any state of circumstances would justify the refusal of an option to a taxpayer by the Government to pay either in money or in kind. Neither is it conceivable that any such form of taxation would be justifiable where the requirement that taxes should be paid in kind is limited to a small class of persons engaged in a particular business and not in the form of a general levy. The fact can not be denied or evaded that under this act the State wanting specific property for a specific public use has exacted that property from a limited number of individuals, without making compensation. Such an enactment is without precedent so far as counsel have been able to find in American legislation.

Neither can there be any force in the argument that public necessity justifies such action on the part of the State. It has the power of eminent domain which will enable it to obtain any property it may need. It has the power of taxation to provide itself with revenue to make compensation for such property. No degree of necessity can justify the overriding of the great principle of justice that no individual should be compelled to devote his property to public use without just compensation. *Delaware, L. & W. R. Co. vs. Town of Morristown*, 276 U. S. 182.

In *Gray upon Limitations of Taxing Power*, p. 130, Section 180, the author by way of contrasting the power of eminent domain with that of taxation, says:

> "The power of eminent domain is the power which the State has, by virtue of its inherent sovereignty, to appropriate for public uses the property of individual citizens, divesting the title of the private owner if need be. The primary reason of its existence is public necessity. It is not a burden imposed on the individual, but relates to the property. The need of the public for the particular piece of property in question is the element which sets the power of eminent domain

in motion. Its ownership, its character of realty or personalty, the inconvenience to the owner as compared with the owners of other property, these are absolutely immaterial considerations. The question in eminent domain is: *Does the State need this particular property for a public use?* "

In Lewis on *Eminent Domain*, Sec. 4, it is said:

"A tax is a contribution exacted by the government from all the individuals of the State, or from those of a particular class or locality, for the purpose of defraying the public expenses. The contribution may be of money or of property. But where property is exacted instead of money *it is not because the State needs the particular property*, but because that form of exaction, owing to the scarcity of money will be more promptly and certainly complied with. Taxation is also based upon some rule of apportionment, as when made upon persons according to number, or upon property according to value or quantity or benefits. In all these respects a tax differs from an exercise of the power of eminent domain. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. *Private property taken for public use by right of eminent domain, is taken not as the owners share of contribution to the public burden, but as so much beyond his share.* Special compensation is therefore to be made in the latter case because the government is a debtor for property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual and without reference to the amount or value exacted from any other individual or class of individuals."

The language of the Act of 1927 leaves no doubt that the object of the legislature was to require from the packer ten per cent. (10%) of their shells because they were desired by the State for the purpose of resuscitating the oyster industry. This the act in terms avows. It separated the packers from all the other people of the State and from all others in any way engaged in the oyster industry for the reason that they had the kind of property which the State wanted. There was no other basis for creating this class of persons.

It is impossible to regard this exaction as a privilege tax or as an excise because, if it had been the intent of the legislature to levy such a tax it would have levied it so that it would have been payable in money. There is no imaginable basis for the exaction in the present case from the limited class of persons described except the desire of the State to get their property. And this is palpably an unconstitutional basis of classification.

It is suggested in the opinion of the Court below that the act is sustainable under the cases of *State vs. Applegarth*, 81 Md. 293, and *Applegarth vs. State*, 89 Md. 140. But reference to those cases will show that they afford no precedent whatever for the legislation here in question. They upheld an ordinary privilege tax or excise levied upon the packers of oysters payable, of course, in money. The rights of the packers in their private property were not disturbed at all.

If the exaction in question violates the fundamental law in that it undertakes to acquire private property for public use without just compensation, it follows of course, that the packer can not be required to submit to this unconstitutional invasion of his property rights as a condition to the exercise of the right to conduct the business of a packer of oysters in the State of Maryland. That is a perfectly lawful business which the appellants in this case and others have conducted over a period of years and in which they have invested large amounts of money. *Neither under the police power nor under any other power*

has the legislature the right to impose an unconstitutional condition to the further conduct of such a business.

No matter how unlimited the power of a State may be with respect to any particular subject matter of governmental regulation, this Court has in a number of decisions declared that it can not exercise such power so as to make the right of a citizen *depend upon his submission to a condition which is in itself a violation of a constitutional provision.*

In *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583, the exact question was determined. There the State of California undertook, in pursuance of its power to regulate the use of the public highways and also its power to regulate common carriers, to provide that a private carrier should, as a condition precedent to the use of the highways of the State, assume the burden of acting as a common carrier. While the State had the right to regulate private carriers in their use of the State roads, this Court held that the State did not possess the power to require private property to be dedicated to a public use *as a condition precedent to the exercise by a private carrier of the right to use the State highways.* The language of this Court in the decision referred to is so conclusive of the present case that we quote it at length.

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in *Michigan Commission vs. Duke*, 266 U. S. 570, 577-578. See also, *Hissem vs. Guran*, 112 O. S. 59; *State vs. Nelson*, 65 Utah 457, 462. The naked question which we have to determine, therefore, is whether the State may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the State altogether to withhold if it sees fit to do so. Upon the answer to this

question, the constitutionality of the statute now under review will depend.

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the State possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the State does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the State may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not

> impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (pp. 592-594.)

Applying this language to the present case we find that even though for the purposes of argument it be conceded that the State of Maryland has the power to impose a privilege tax or an excise upon the packers of the State, or has the power to prohibit the business of packing oysters altogether; nevertheless the State can not make any regulation or prohibition with respect to the business dependent upon any requirement which *per se* is a violation of a constitutional inhibition. Consequently, as the requirement of the delivery of shells by the packer under the act of 1927 constitutes a taking of private property for public use without compensation in violation of the Constitution of the United States, it is invalid even though the State may possess general power of regulating or prohibiting the industry in question, because it attempts to make submission to this violation of the fundamental law a condition precedent to the exercise of the right to conduct the business of a packer and to the use of property already dedicated to that business.

It will also be observed that the exaction of this act operates directly upon the property of the packer, and thus another of the distinguishing features of the power of taxation is absent; that is, that the tax shall be levied upon the individual. In 1 *Cooley on Taxation*, Sec. 24, it is said:

> "The individual and not his property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law."

In normal times, of course, there can be no reason whatever for permitting or requiring a tax to be paid in property. Money will be readily available to those having property, and the only reason why in such times any exaction should be made of a specific kind of property is because the State wants to acquire it without complying with the constitutional mandate that compensation shall be made therefor.

It was suggested in the lower Court that those statutes which have been enacted in various states requiring residents of the State to give a certain amount of labor upon the public roads afforded a precedent for the Act of 1927. It was said that the labor of a man is his property, and if a man's labor could be required, any other form of property could likewise be exacted. This argument, if sound, would make a dead letter of the constitutional inhibition to which we have so often referred. The truth is that those statutes exacting labor are not regarded as taxing statutes at all. They are justified under the power of the State to exact certain services from its citizens as fundamental political duties, like jury service, service in the militia, or in a *posse commitatis*. In *Butler vs. Perry*, 240 U. S. 328, one of these labor statutes was under consideration, it having been challenged upon the ground that it was in violation of the Thirteenth Amendment prohibiting involuntary servitude except as a punishment for crime. Mr. Justice McReynolds, speaking for this Court, goes thoroughly into the history of such legislation and shows that from ancient times the duty of maintaining roads has been placed along with the other political duties referred to above, and the statute was sustained upon that ground. See also the decision of the Court of Appeals of Maryland in *Short vs. State*, 80 Md. 392.

It will be seen by reference to the Maryland decision just cited, as well as to the decision of this Court in *Butler vs. Perry, supra*, that the statutes involved in those cases made it optional with the person subject to the act to render either the labor or its equivalent in money, and this is the form of practically all such statutes. Moreover, they were general

in their operation, all residents of the community being subject to their requirements.

Research has disclosed no vestige of authority giving support to the form of enactment contained in the Act of 1927. There are general statements among the text writers to the effect that taxes may be levied either in money or in property, which, of course, it is not necessary to deny, because there might be occasions where no revenue could be raised unless the taxpayers were permitted to give money's worth instead of money. Such statements, of course, refer to a general levy of taxes in such a form, and do not include the case where an exaction of particular property from a narrow class of individuals amounts to a taking of their property without just compensation. There has, however, never been in this country an example of any levy of taxation payable only in property so far as counsel have been able to find. Certainly no government unless it had some purpose other than raising revenue in mind, would levy a tax payable only in property. It would not take away from the taxpayer the right of paying in money if he so desired. The following quotation from 1 *Cooley on Taxation*, Sec. 23, is illustrative of the statements to which we have referred:

> "Taxes are generally demanded in money and any tax law will be understood to require money when a different intent is not expressed. But if the condition of any State, in the judgment of the legislature shall require the collection of taxes in kind—that is to say by the delivery to the proper officers of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the Federal Constitution. Instances of taxes in kind occurred in the colonial period."

In *Williams* Case, 3 Bland, 186, 255, Chancellor Bland refers to the fact that certain taxes were payable in tobacco in Maryland in colonial times under certain statutes

of the Proprietary Government. In *Lane vs. Oregon*, 7 Wallace, 71, the general statement is made that a State does not have to require taxes to be paid in money, but may make them payable in any form it sees fit.

None of the statements above referred to in any way affords justification for the exaction in question. Tobacco, of course, was legal tender in Maryland in colonial times and was regarded as a substitute for coin, and the remark of Judge Cooley and that of this Court manifestly contemplated similar instances where the State would levy taxes generally upon all of its citizens payable in some product or commodity which could be regarded as a substitute for money. These statements do not sanction the selection of a narrow and limited class of individuals simply because they possess property which the State wants, and compelling them to render a portion of such property to the State while every other citizen is allowed to pay his taxes in money.

II.

It is submitted that upon the authority of *Foster-Fountain Packing Co. v. Haydel, supra*, and the companion case of *Johnson v. Haydel*, the provision of the act in question requiring the delivery of ten per cent. (10%) of the shells from oysters packed within the state is an unconstitutional burden upon interstate commerce. If the state has released any property right it may have in the oysters taken from the bottoms under its control it can not thereafter restrict the movement of these shells in interstate commerce. The requirement, therefore, that ten per cent. (10%) of the shells mentioned shall be delivered to the state necessarily removes this ten per cent. (10%) from the channels of interstate commerce and is not only a restraint upon such commerce, but a denial entirely of the right to engage therein so far as the shells taken are concerned.

III.

What has been said in support of appellants' first proposition is sufficient to show that if the exaction under discussion is regarded as one in the nature of a tax it must fail, because, being imposed upon a narrow class of persons and upon no others, appellants are denied the equal protection of the laws of the State of Maryland. There can be no possible justification for the selection of the class from whom this exaction is made, except the desire of the state to obtain a particular kind of property which they possess. Such a basis of classification it has already been shown is forbidden by the due process of law because of the Fourteenth Amendment. If the contention of appellants is correct in that respect it must follow that the attempt of the Legislature to impose upon them the obligation to deliver a certain portion of their property is a denial to them of the equal protection of the laws of the state. Except in form the contention under the proposition now being discussed does not differ from that set forth under the first proposition advanced in this brief.

IV.

It will be seen that in addition to the requirement that the packer shall, at the option of the Conservation Department, deliver ten per cent. (10%) of the shells in his possession he is further required to store them upon his premises until the 20th day of August in each year. The Act directs the Conservation Department, on the first day of May following the close of the packing season, to notify the packer whether it is its intention to take ten per cent. (10%) of the shells or the equivalent in money, and further provides that if shells are demanded by the department they shall be removed before the 20th day of August thereafter. The packer is thus obliged to keep upon his premises at least ten per cent. (10%) of all shells coming from oysters packed by him during the current season,

which begins on September 1, until the first day of May following. If at that time the Conservation Department decides to take the shells instead of money, the packer is required still further to store the ten per cent. of the shells until removed by the department, which is given until the following 30th of August to complete such removal. Manifestly, therefore, in addition to the appropriation of the shells by the state, the packer must devote a certain portion of his premises to the use of the state without receiving any compensation therefor. It will be seen from the quantities of oysters packed by appellants as disclosed by the record, amounting to 50,800 bushels in one season, and 52,740 in another, that the space upon appellants' premises which it will be necessary to devote to the keeping of these shells is by no means negligible. Even if it be assumed for purpose of argument only, that the State could require the delivery of the shells in the way provided by the act under consideration, it could not in the exercise of such a right require appellants to devote a substantial portion of their property to the storage of the shells, where as to some of them the period of storage would continue for nearly a year.

The decision of this court in *Delaware, L. & W. R. R. Co. v. Town of Morristown, supra*, would seem to be conclusive of the present case. There the Railroad Company maintained upon its property a hack stand, the use of which was limited to one operator of hacks. The town undertook by ordinance to make this private stand a public one upon the ground that this would promote the public welfare. In holding this ordinance void this court said:

> "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property

used belongs to petitioner. The state may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment." (p. 193.)

CONCLUSION.

It is respectfully submitted that for the foregoing reasons the judgment of the Court of Appeals of Maryland should be reversed and the case remanded so that the writ of mandamus may issue as prayed.

Respectfully submitted,

WILLIAM L. RAWLS,

Counsel for Appellants.

APPENDIX.

Stipulation of the Parties.

It is hereby stipulated and agreed between the parties to this case that:

1. The appellants, in the month of September, 1928, renewed their application for a license to pack oysters at their plant in Cambridge, Dorchester County, Maryland for the season of 1928-1929, in the same form and manner as it appears from the record herein that application had been made for the season 1927-28, and that said application was refused by the appellee in the form and manner in and by which he refused the said application of appellants for the said season of 1927-28, as shown by the record herein.

2. It is further stipulated and agreed between the parties hereto that no shells have been taken from appellants by the appellee for the season 1927-28 in pursuance to the provisions of Chapter 119 of the Acts of General Assembly of 1927, nor has the equivalent in money of said shells been collected by said appellee, it being the purpose of the parties to withhold any such action until the decision of this case by this Court.

(Signed) WILLIAM L. RAWLS,
Attorney for Appellants.

THOMAS H. ROBINSON,
Attorney General,
Attorney for Appellee.